

US EPA ARCHIVE DOCUMENT

Final Summary of Tribal Consultation for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule

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Introduction

The Environmental Protection Agency (EPA) and the Department of the Army (Army) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA). The Clean Water Rule seeks to clarify the definition of “waters of the United States” and the extent of CWA jurisdiction established by statute.

Subject to Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000), agencies generally may not issue a regulation that has tribal implications: 1) that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the agency consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement; or 2) that preempts tribal law unless the agency consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

This action does not have tribal implications as specified in E.O. 13175. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal views and solicited their comments on the proposed action and on the development of today’s rule. In the course of this consultation, EPA coordinated with Army, and Army jointly participated in aspects of the consultation process.

This report provides a summary of the final Clean Water Rule, and the consultation and outreach conducted with tribal officials during the rulemaking process, the comments received, and how the comments were used to develop the final rule.

The Clean Water Rule

In the Clean Water Rule, EPA and the Army clarify the scope of “waters of the United States” that are protected under CWA, using the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience in implementing the statute. This rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies’ technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

In this final rule, the agencies define “waters of the United States” to include eight categories of jurisdictional waters. The rule maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice. The rule reflects the agencies’

goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule establishes jurisdiction in three basic categories: waters that are jurisdictional in all instances, waters that are jurisdictional but only if they meet specific definitions in the rule, and a narrowed category of waters subject to case-specific analysis.

For more information on the rule, see Clean Water Rule: Definition of “Waters of the United States” in the *Federal Register* (EPA-HQ-2011-0880: FRL-991-47-OW).

Consultation

EPA began consultation with federally-recognized Indian tribes on this rulemaking in 2011, and continued the consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, through November 14, 2014. Consultation was conducted in three different phases:

- Phase I: Early Development of Guidance (later withdrawn) and Early Development of the Proposed Rule
- Phase II: During the Office of Management and Budget (OMB) Review of the Proposed Rule
- Phase III: Public Comment Period for Proposed Rule

EPA invited tribes to provide written comments on the rulemaking process in 2011 during Phase I, and again in 2014 during Phase III. This section will provide a brief summary of meetings held and comments received from tribes during the consultation and outreach conducted from 2011-2014.

Phase I: Early Development of Guidance (later withdrawn) and Proposed Rule

Phase I of the consultation process was initiated by Acting Assistant Administrator Nancy Stoner and wetlands program managers consistent with the consultation plan in the notification letter on April 29, 2011. At the time the consultation began in 2011, EPA and Army were considering the development of a revised implementation guidance document to assist with field determinations on “waters of the United States” under the CWA. Based on public feedback received from outreach to tribes and other stakeholders, the agencies shifted their focus to development of a proposed rule to clarify and strengthen the existing definition of “waters of the United States.” The draft guidance document and other supporting materials were used to initiate preliminary dialogue on the proposed rule while it was under development.

On October 12, 2011, EPA sent a Tribal Consultation Notification letter to all federally recognized tribal leaders, via mail and email, inviting tribal officials to participate in consultation and coordination events and provide comments to EPA in coordination with Army. EPA also notified tribes of the consultation via the Tribal Consultation Opportunities Tracking System on the EPA Tribal Portal (<http://tcots.epa.gov>). EPA consulted with tribal officials consistent with the consultation plan developed for the proposed rule to gain an understanding of tribal views and solicited their comments on the proposed action and on the development of today’s rule. In the course of this consultation, EPA coordinated with Army, and Army jointly participated in aspects of the consultation process. Close to 200 tribal representatives, and more than 40 tribes participated in the consultation process for the proposed rulemaking, which included multiple webinars, national teleconferences, and face-to-face meetings. In addition, EPA received written comments from the following tribes during this consultation period:

- Bridgeport Indian Colony
- Pokagon Band of Potawatomi Indians
- Ute Indian Tribe Uintah & Ouray Reservation

The Bridgeport Indian Colony expressed neutrality indicating the tribe would not be impacted. The Pokagon Band of Potawatomi Indians recommended the agencies reduce the number of agricultural exemptions, and consider the important effects ditches could have on water quality. The Ute Indian Tribe Uintah & Ouray Reservation opposed the rule, and viewed it as an over-expansion of regulatory scope.

Each comment has been reviewed and considered in the development of the proposed and final rule.

Phase II: Coordination during the Office of Management and Budget Review of the Proposed Rule

The proposed rule was under development from 2011- 2012 and submitted to the Office of Management and Budget for Review on September 17, 2013, and released for publication on March 24, 2014.

During this time EPA continued to coordinate with tribes by providing status updates on the proposed rule to key tribal stakeholders through the National Tribal Water Council, the National Tribal Caucus, the United South and Eastern Tribes, and EPA's Regional Tribal Operations Committee meetings. EPA also used these forums to update tribes on other related topics such as the release of the September 2013 science report on the Connectivity of streams and wetlands and its review by the Science Advisory Board.

Phase III: Public Comment Period for Proposed Rule

The agencies proposed a joint rule on April 21, 2014, and solicited comments for over 200 days. On October 16, 2014, EPA sent a Tribal Consultation Notification letter to all federally recognized tribal leaders, via mail and email, inviting tribal officials to participate in consultation and coordination events and provide comments to EPA in coordination with Army. EPA also notified tribes of the consultation via the Tribal Consultation Opportunities Tracking System on the EPA Tribal Portal (<http://tcots.epa.gov>). EPA consulted with tribal officials consistent with the consultation plan developed for the proposed rule to gain an understanding of tribal views and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA coordinated with Army, and Army jointly participated in aspects of the consultation process. Phase III of the consultation process was initiated by EPA Deputy Assistant Administrator for Water Kenneth J. Kopocis and wetlands program managers consistent with the consultation plan in the notification letter.

EPA conducted a national tribal teleconference on October 23, 2014, led by Deputy Assistant Administrator Kopocis. Representatives from 13 tribes and 4 EPA Regions (Regions 4, 5, 9, and 10) participated on the consultation call. EPA Region 10 conducted additional consultation with tribes in their Region following this call. The EPA's Office of Water and Army also participated in a tribal technical information webinar hosted by River Network on November 3, 2014, to provide a public discussion opportunity for tribes to ask detailed questions and provide input to the proposed Clean

Water Rule. Over 70 tribal representatives participated in the webinar, which included presentations by several tribal representatives providing different perspectives of tribes located in the arid southwest and Great Lakes Region.

In addition, EPA received written consultation comments from the following tribes and tribal organizations during this consultation period:

- Arctic Slope Regional Corporation, Inupiat Community of the Arctic, and North Slope Borough
- Barona Band of Mission Indians
- California Indian Environmental Alliance
- Chickaloon Native Village
- Curyung Tribal Council, and tribes in the Region 10 tribal caucus
- Gila River Indian Community
- Great Lakes Indian Fish and Wildlife Commission
- Keweenaw Bay Indian Community
- Lac Du Flambeau Band of Lake Superior Chippewa Indians
- Red Cliff Band of Lake Superior Chippewa Indians
- Muckleshoot Indian Tribe
- National Tribal Water Council
- Navajo Nation
- Native Village of the Nusquit
- Pueblo of Sandia
- Pyramid Lake Paiute Tribe
- Quapaw Tribe of Oklahoma
- Red Cliff Band of Lake Superior Chippewas
- San Carlos Apache Tribe
- SeaAlaska Native Corporation
- Sokaogon Chippewa Community
- Southern Ute Indian Tribe Growth Fund
- Swinomish Indian Tribal Community

In total, the agencies received 23 comment letters from tribes and tribal stakeholders. The comments received from the National Tribal Water Council were outside of the scope of this rule. Of the remaining 22 comment letters received, 14 were in support of the rule. One letter opposed the proposed rule as an over-expansion of regulatory scope. Six comment letters summarized concerns with the proposed rule, such as the unintended expansion of regulatory scope, the lack of clarity among the proposed definitions, the potential economic burden the proposed rule could create, the impact of the proposed rule on water quality, and the ambiguity of future significant nexus determinations.

Tribes in support of the definition of “waters of the United States” described the rule as protecting many waters that are unprotected, such as isolated wetlands and headwaters, and suggested the definition include connections through shallow groundwater flow, deep groundwater, seepage lakes, and abandoned rice paddies. Other tribes in support of the rule suggested that adjacent waters should

include waters within the floodplain, and that “other” waters need to meet the interstate commerce clause, and include potholes, northern lake, and forest ecosystems.

Some tribes expressed that EPA needs to consult on treaty agreements when implementing the rule, and that interstate waters needs to include tribal boundaries. Several tribes asked for more clarity for definitions, especially the definition of tributary, and clarity regarding key terms such as gradient of connectivity, cumulative effects, flow, gullies, insubstantial, high flow, moderate flow, nexus, swales, rills, riparian areas, significant, and speculative.

Tribes opposed to the rule asserted that the rule is too expansive and poses a burden to the sovereign interests of tribes, tribal programs, the regulated community and economic development. Tribes in arid areas cited concerns that the definition of “Waters of the United States” would cover most of their lands, including most lands for development. Some tribes in Alaska shared concerns that the rule would expand CWA section 404 coverage in the temperate coastal rainforest, and wetlands on the North Slope, and that the proposed rule is unclear about which wetlands are jurisdictional and which are not, including wetlands that lie atop permafrost.

EPA sent follow-up letters to each tribe who submitted written comments during the consultation period from 2011-2014. Each letter summarized the comments received, and explained how final responses to their comments for the final rule will be found in the response to comment document. Each comment has been reviewed and considered in the development of the proposed and final rule. The details of these comments and EPA’s responses can be found in the response to comment document located in the docket for the final rule (Docket No. EPA-HQ-2011-0880).

Conclusion

Tribal consultation on the Clean Water rule was conducted in accordance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011). On May 21, 2015, EPA’s Office of International and Tribal Affairs confirmed the adequacy of the agencies’ tribal consultation in the attached memorandum. The technical input received during the full tribal consultation and coordination process informed the rulemaking process from the onset of rule development through the completion of today’s final rule.

In the Clean Water rule, the agencies define “waters of the United States” to include eight categories of jurisdictional waters. The final rule does not establish regulatory requirements and, therefore, does not impose direct costs on any entity. Instead, it is a definitional rule that clarifies the scope of “waters of the United States.” The final rule provides more bright lines and simplifies definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency of implementation, thereby reducing uncertainty in CWA compliance. The Clean Water rule is consistent with the agencies’ authority. The agencies respect both the states’ and tribes’ critical roles in protecting water quality and this rule does not supplant that role or their authorities. The federal interest in protecting waters, as shown by the CWA, nonetheless is strong, and the rule is a reasonable, legally sound, and scientifically based delineation of waters subject to the CWA.